

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL

77-6201

To be argued by:
ARTHUR N. BROOK

United States Court of Appeals
FOR THE SECOND CIRCUIT

GREAT AMERICAN INSURANCE COMPANY,
Plaintiff-Appellant,
against

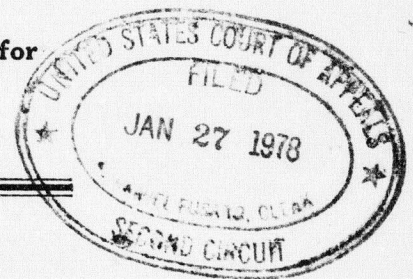
THE UNITED STATES OF AMERICA,
Defendant-Appellee.

On Appeal from the United States District Court for
the Eastern District of New York

BRIEF OF PLAINTIFF-APPELLANT

REIN, MOUND & COTTON
Attorneys for Plaintiff-Appellant
130 John Street
New York, New York 10038
(212) 425-9200

ARTHUR N. BROOK
Of Counsel



of

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UNITED STATES COURT OF APPEALS
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GREAT AMERICAN INSURANCE COMPANY,

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-against-

THE UNITED STATES OF AMERICA,

Defendant-Appellee.

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For the Eastern District of New York

BRIEF OF PLAINTIFF-APPELLANT

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Whether the court below erred in holding that the claim asserted by plaintiff is not one for indemnity but is only, rather, a claim arising out of plaintiff's right of subrogation. If the plaintiff's claim be that of indemnity, whether or not it also be one arising out of plaintiff's right of subrogation, the action would not be time-barred. Plaintiff contends that the court below erred in finding that plaintiff's claim is not that of indemnity and is therefore time-barred.

STATEMENT OF THE CASE

This is an action by the Great American Insurance Company brought under the Federal Tort Claims Act to recover sums of money paid by the Great American to its insureds in settlement of their claims under a fire insurance policy. The claims asserted against the insurer were the subject matter of a lawsuit brought in the state courts. After that lawsuit was settled, the Great American Insurance Company sued the United States contending that the vandalism and malicious mischief which generated the requirement that it pay under its policy had been conducted under the direction, supervision and protection of United States Marshals and that the United States ultimately profited financially from the entire occurrence.

The state lawsuit as to the occurrence of January 5-6, 1973 was ultimately settled on December 15, 1975. Five months later the plaintiff herein filed claim with the United States Marshals Service, which claim was denied on November 10, 1976. This suit ensued shortly thereafter.

The Government moved to dismiss the complaint on the ground that the plaintiff's claim had accrued within the meaning of 28 U.S.C. §2401(b) at the time of the destructive acts of January, 1973 and, hence, was time-barred. The plaintiff contended that its cause of action (at least the second cause

of action of the two asserted in the complaint) would not be barred because it is one for indemnification, an indemnification claim not accruing until the indemnitee (here the insurer) makes payment. The Government, however, contended that the second cause of action does not assert a true claim for indemnification and is one solely in subrogation.

By memorandum and order dated November 1, 1977, the United States District Court for the Eastern District of New York (Hon. George C. Pratt) granted the Government's motion and dismissed the complaint. A judgment of dismissal was filed on that same date. The plaintiff appeals from the order and judgment.

STATEMENT OF FACTS

The Great American Insurance Company had issued its policy #4538742 to effect coverage for fire etc. on a house located in West Hempstead, New York (19a).^{*} The owners and the mortgagees of those premises made claim of the insurer for payment because of damage and destruction at the premises caused while tenants Irene & Herbert Hurwitz were moved out of the premises under the direction, supervision and protection of United States Marshals. That move, which took place in the middle of the night in January, 1973, left the premises a shambles of destruction, the Nassau County Police listing the occurrence as a burglary

^{*} Numbers in parentheses refer to page numbers of the Appendix.

and grand larceny (19a-20a). The police were apparently able to go no further in the investigation since the Hurwitzes, after leaving with United States Marshals and 43,000 pounds of property largely not belonging to the Hurwitzes, have been secreted by the Government, given new identities and otherwise made unavailable (20a).

Subsequently, the owners and mortgagees, Robert Associates and the Chase Manhattan Bank, brought suit for the damage against the Great American in the Supreme Court of the State of New York, County of Nassau, seeking recovery in the sum of \$45,000. Requisite diversity jurisdiction did not exist in that action thereby precluding Great American from removing the action to the Federal court where it could have joined the United States as a third-party defendant pursuant to the Federal Tort Claims Act. (20a).

After completion of pre-trial discovery in the state lawsuit, the parties worked out a settlement of that \$45,000 lawsuit with the insurer paying \$18,699.80 to Robert Associates (the title holder and second mortgagee) and the Chase Manhattan Bank (the first mortgagee). This payment was made on December 15, 1975. (21a). On May 21, 1976 claim was duly filed with the United States Marshals Service, and on November 10, 1976 that claim was denied on the merits by William E. Hall, Director of the Service. The instant action ensued. (21a)

The amended complaint contains two causes of action, the first sounding solely in subrogation and the second being one for indemnity. (12a-18a) In essence, it is alleged that in the early morning hours of January 5-6, 1973, under the direction, supervision and protection of United States Marshals and with the participation of those Marshals, the Hurwitzes vacated the insured premises and in that process removed fixtures, and other items which had been affixed to the realty and which did not belong to those tenants. Included were light fixtures, plumbing fixtures, hardware, door fittings, cabinets, sinks, dishwasher, ranges, built-in grills, electrical switch plates and wiring, built-in mirrors, electrical fixtures, bathroom and shower fittings, ceiling fixtures and fans, built-in carpeting, washers and dryers totaling approximately 43,000 pounds in weight. Additionally, it is alleged that extensive damage was done to the insured premises during this process including damage to abutting grounds. It is further alleged that subsequently 20,000 pounds of these materials were sold at auction with the proceeds of such sale going to the tenants or to the United States Government or both. (13a-14a)

The essence of the Government's motion below was that the plaintiff's claim accrued within the meaning of 28 U.S.C. §2401(b) at the time of the initial destructive acts of January, 1973 and the insurer is no more than a subrogee of its insureds.

The Government concedes, however, that the cause of action for indemnification would not be time-barred since that cause of action did not accrue until the indemnitee (the insurer) made payment. The Government contends that the insurer does not have a true claim for indemnification and the court below agreed with this contention. It is the plaintiff's position that irrespective of any formalistic labels, the essence of this action is one for indemnification and, hence, the claim accrued when the insurer made payment and is, accordingly, not time-barred.

ARGUMENT

POINT I

THE PLAINTIFF'S ACTION IS ONE FOR
INDEMNIFICATION AND IS NOT TIME-
BARRED.

Both the defendant and the court below concurred that the statute of limitations for an indemnification claim runs from the date of payment, which is the date the right to indemnity accrued to the payer. It is further conceded that if the plaintiff's action be construed as one for indemnification, it is not time-barred. Defendant then contends, and the court below agreed with such contention, that this action is not one for indemnification. It is respectfully submitted that the cases and treatise materials extant belie this contention and that there is no support for the ruling of the court below. On the contrary, the cases demonstrate that there is no

genuine difference between subrogation and indemnification and that the two concepts could and very often do exist side by side.

The court below correctly capsuled the plaintiff's argument that:

"...the difference between indemnification and subrogation is not only elusive, but virtually non-existent. It compares the difference as 'that between cherubim and seraphim in the angelic orders' citing United States Lines v. United States 470 F. 2d 487 (CA 5, 1972)." (28a)

The court then made reference to the cases cited by the plaintiff in support of its argument, but distinguished them on the ground that none of them involved a claim by an insurance company. It is respectfully contended that, though those cases do not involve claims by insurance companies, they are not distinguishable on that ground. The principles of law postulated in those cases transcend the mere nature of the business of the litigants.

The classic definition of indemnification is found in 28 N.Y. Jurisprudence, Indemnification, §11:

"...When, by the wrongful or tortious act of a person, another is rendered liable, there arises an implied contract on the part of the wrongdoer to indemnify the innocent party. The right of indemnity rests upon the principle that everyone is responsible for the consequences of his own acts, and if another person is compelled to pay damages which ought to have been paid by the wrongdoer, such damages may be recovered from the wrongdoer by the person indemnified." (Emphasis supplied)

The next section of the indemnification portion of N.Y. Jurisprudence goes one step further and elaborates. So it is stated at 28 N.Y. Jurisprudence, Indemnification, §12:

"...A right to indemnity arises where the relationship between the parties is such that one is legally liable although he did not join in the tortious act. Thus, an implied right to indemnity arises where a master is held liable to an injured person solely on the basis of respondeat superior where the servant alone committed the wrongful act;...Similarly, a right of indemnity has been applied in favor of a principal against his agent; as between principal and surety and principal and guarantor; as between landlord and tenant;..."

In the "cherubim and seraphim" case, United States Lines v. United States (supra), the Fifth Circuit affirmed the ruling of the District Court and adopted its opinion as its own, holding that the applicable two year statute of limitations ran from the date that the United States Lines had paid its injured employee. In that case, the employer had settled a lawsuit brought against it by an injured seaman. After settling that lawsuit, the employer then brought an action under the Federal Tort Claims Act against the United States, alleging that the injury to the seaman had been caused by the negligence of Government employees. The Government moved for dismissal on grounds identical to those asserted in the case at bar, contending that the case in United States Lines was "...a case of subrogation and not one of implied indemnity..." and to that extent "...is subject to the defense of the bar of the two year statute of limitations." (p.493). The court discarded this argument with the statement:

"It is extremely difficult to tell legal subrogation and implied indemnity apart. They are closely related and 'oftentimes the possessor of one right is also the possessor of the other.'...In their outer bounds the difference between them is about that between cherubim and seraphim in the angelic orders." (page 494)

The Circuit Court in United States Lines concluded by saying:

"It is not necessary to decide the subrogation issue. Since I have ruled that a claim for relief is stated under the theory of implied indemnity what difference does it make if United States Lines also possesses a right of action based on subrogation. The latter claim is without the statute of limitations; the former is within it. The plaintiff is still in court no matter how you look at it." (page 494)

The case of Chicago Rock Island & Pacific Railway Co. v. United States, 220 F. 2d 939 (7th Cir. 1955) is another case where an employer (the railroad) had made payment to its employee for injuries caused not by the employer but by an employee of the United States. After the railroad settled its employee's claim, it sued the United States under the Federal Tort Claims Act and characterized its action as one for indemnity. The suit against the United States, while commenced within two years of the payment, was commenced more than two years after the original injury. As in the case at bar, the Government in the Chicago Rock Island case claimed that the action was time-barred. Responding to various Government arguments, the 7th Circuit bench stated:

"The government makes a refined and technical argument in its attempt to distinguish between the rights of a subrogee, joint tortfeasor and indemnitee to recover under that Act. We need not attempt to follow this discussion because any merit which it might once have possessed is now water over the dam in view of numerous cases which have held adversely to the government's contention."

The Court concluded that no claim accrued to the railroad against the Government until the railroad settled with and made payment to the injured employee.

"The government's contention on this point, if sustained, would mean that a suit under the Tort Claims Act could be barred before it came into existence. Such an application of the limitation provision would produce an incongruity which we think should not be made." (page 942)

In United States v. Farr & Co., 342 F. 2d 383 (2nd Cir., 1965) Judge Marshall defined indemnification as:

"...merely a legal tool for passing a liability on to the party who is ultimately responsible for the loss the court has attempted to redistribute."

In Farr a seller of what turned out to be contaminated sugar made payment to the buyer of the contaminated sugar, but made that payment not because the seller had actually contaminated the sugar but, rather, pursuant to a hold harmless agreement. Following its contractual payment to the buyer, the seller sought indemnity from a third party which was actually responsible for the contamination. This Court held that the statute of limitations did not begin to run on that claim until the indemnitee (the seller) had made its initial payment to the buyer pursuant to contract.

In Kantlehner v. United States, 279 F. Supp. 122 (EDNY, 1967), Chief Judge Mischler stated:

"A party's right to either indemnity or contribution is derivative, and remains inchoate until the settlement or resolution of the primary action. The cause of action, for limitations purposes, does not accrue until the payment has been made."

And going on:

"...A right of indemnity exists where the parties are not equally culpable, and has the effect of shifting the entire loss to the more culpable wrongdoer."

In Newsum v. Pennsylvania Railroad Co., 79 F. Supp. 225 (SDNY, 1948), an employee of the railroad sued the railroad for personal injuries suffered while he was employed. He had been run over by a United States postal truck. The suit against the railroad was brought pursuant to statute. The railroad, in turn, impleaded the United States, alleging that it was the negligence of the United States' postal truck which actually caused the injuries. The court therein stated:

"Insofar as the Federal Tort Claims Act is concerned and the right to sue, there is no substantial difference between the position of an indemnitee and a subrogee, each is founded upon the principle that a benefit has been conferred on one party at the expense of the other."

The facts in the case at bar come within the ambit of indemnification as set forth in the cases and the treatises. The Great American Insurance Company was not a tortfeasor in

any way and did not cause the damage suffered by its insureds; whereas, employees and agents of the United States allegedly did. But for the tortious acts of agents or employees of the United States, there would have been no loss suffered by Robert Associates and the Chase Manhattan Bank. When that loss did take place, however, Robert Associates and the Chase Manhattan Bank looked in the first instance to their insurer to pay pursuant to its insurance contract. That insurer, having paid pursuant to its contract, now looks to the party which actually caused the harm so as to "...shift [ing] the entire loss to the more culpable wrongdoer."

Kantlehner v. United States (supra). The Great American was the "innocent party" and the United States the "wrongdoer" within the context of the treatise definition of indemnity:

"...an implied contract on the part of the wrongdoer to indemnify the innocent party."
28 N.Y. Jurisprudence, Indemnification, §11.

The aforementioned cases, as they apply factually to the case at bar, are summarized as follows:

United States Lines v. United States:

The shipping line settled a lawsuit brought against it and thereby discharged the obligation of the United States whose employees actually caused the injury. The shipping line was thereafter allowed to seek indemnification from the United States with whom it had no relationship other

than that of implied indemnity which arose as a result of the causing of the injuries by employees of the United States.

Chicago Rock Island & Pacific Railway Co. v. United States:

The railroad, an innocent employer, settled an employee's claim and sought indemnity against the United States as the actual tortfeasor. The railroad had had no relationship with the United States until the implied contract of indemnity arose by virtue of employees of the United States causing the injuries to the railroad's employee.

United States v. Farr & Company:

The seller of sugar that ultimately turned out to be contaminated made a payment to its buyer pursuant to the terms of a hold harmless agreement and not because that seller had contaminated the sugar. Thereafter, the seller sought indemnity over as against the party actually responsible for the contamination.

Newsom v. Pennsylvania Railroad:

The railroad, an innocent party, settled a claim with its injured employee because of liability imposed on the railroad by statute. It, in turn, sought indemnity from the United States whose postal truck had actually caused the injuries. The railroad had no relationship with the United States save that of implied indemnity which arose because of the active negligence of the postal service.

The Great American Insurance Company stands in the precise position in the case at bar as did the railroads, steamship companies, etc. in the cited cases. In those cases, payment was made in the first instance to an injured party pursuant to an obligation of contract or pursuant to some imposed obligation rather than because the initial payer actually caused the harm. Thereafter, the initial payer sought indemnification from the party ultimately and actively responsible for the harm. The courts hold in all of those cases, which involved the issue of when the statute of limitations began to run, that those were cases of indemnification, with the statute beginning to run only when the initial payment was made. In the case at bar, the insurer made its payment to its insureds because it had a duty to do so pursuant to its insurance contract. By making such payment, it discharged the obligation which was really that of the party that caused the harm, i.e., the United States. Because of this, an implied contract of indemnity arose upon payment by the insurer, who now seeks to enforce that contract of indemnity against the actual alleged tortfeasor.

What is involved here is clearly classic indemnification. Whether the indemnitee be an insurance company or a railroad or a steamship company or a party to a hold harmless agreement, the concept is still one of indemnification, though in the case of an insurance company transaction there may also be "subrogation." The concepts are virtually identical, if not entirely so, and

the Fifth Circuit's 1972 statement is probably most to the point in defining the difference between subrogation and indemnity as being "...about that between cherubim and seraphim in the angelic orders." United States Lines v. United States (supra)

The court below has distinguished the aforementioned cases with the statement:

"When dealing with insurance companies, the rule is different,..." (29a)

No authority is cited making insurance companies somehow different from railroads or steamship companies, though reference is made to the idea that:

"...insurance companies are in the business of taking risks,..." (30a)

There is no authority for the proposition that classic law of indemnification applies to steamship companies, railroads and other business entities but somehow does not apply to insurance companies.

The court below cites the case of Meredith v. Ionian Trader 279 F. 2d 471 (2nd Cir., 1960). It is cited for the proposition that the insurer here:

"...could have required the insureds to cooperate by timely asserting directly against the original tortfeasor any claim to which plaintiff might become subrogated." (30a)

The Meredith case is totally inapposite to the case at bar, and the court below incorrectly perceived the law affecting the Great American insurance policy. In Meredith the ocean marine policy contained a provision by which the insurer could have

required the insured to prosecute libel in admiralty claims prior to the insurer's making payment for damage. The insurer failed to compel the insured to bring a libel but the insurer itself brought such libel in the insured's name. The only problem was it had no authority to bring that libel in the insured's name and, hence, it suffered dismissal of the libel.

In the case at bar, we have an entirely different type of policy than the marine policy in Meredith. The Great American policy is a New York standard fire policy, the terms of which are statutory and set forth in precise detail in the Insurance Law of the State of New York §168. That statutory policy sets forth the requirements which the insurer may impose upon the insured. To impose any additional requirements, such as suggested by the court below, (30a) would require an act of the Legislature.

There are some other interesting things, however, in the Meredith case which militate in favor of the plaintiff's position in the case at bar. The Government has suggested that the Great American could have filed an administrative claim prior to its payment to its insureds, even though it was involved in contested litigation with those insureds and had no right to assert a claim because it had not suffered a loss. Indeed, until that lawsuit was resolved, the Great American did not know it would suffer a loss. The

court in Meredith stated on this point:

"The mere anticipation that the insurer will make payment of the insured's claim does not entitle it to bring suit on its own behalf as subrogee. Prior to the moment of payment or until it becomes legally bound to make payment, the insurer has not been damaged and therefore possesses no equity or interest upon which he could maintain an action against the third party." 279 F. 2d 474.

Indeed, the instructions on the prescribed administrative Claims Act form, standard form #95, provide in part:

"Claims for damage to or for loss or destruction of property or for personal injury, must be signed by the owner of the property damaged or lost or the injured person." (emphasis supplied)

The dilemma in which the insurer found itself here is obvious. If it could have removed the state lawsuit to the Federal court, it could have impleaded the United States as a third-party defendant pursuant to Rule 14(a) of the Federal Rules of Civil Procedure which allows such impleader of a third-party "who is or may be liable." (emphasis supplied). It could not have so impleaded the United States in the state action because the Federal courts have sole jurisdiction in Federal Tort Claims Act cases. It could not remove the case to the Federal court because there was no diversity of citizenship.

As noted by the court below (29a) the Government relies principally on the case of Williams v. Globe Indemnity Co. 507 F. 2d 837 (8th Cir., 1974). In that case the court was

construing an Arkansas three year statute of limitations. An insurance company paid its insured money which had been embezzled by that insured's employee. Though the insurer paid under its policy within a few months after the discovery of the embezzlement, it unexplainably delayed for some three years before bringing suit against the culpable employee. It is obvious from the decision in the case dismissing the action against the employee that the insurer could have sued within the Arkansas statute of limitations but for reasons unstated did nothing.

No reference is made in Williams to any of the decisions or treatise materials cited in this brief and defining the concept of indemnification as much broader than the Eighth Circuit's interpretation. The Eighth Circuit's decision indicates that none of these cases or materials were cited to that court by counsel for the insurer. The Williams case, however, rests principally on the authority of an Indiana state case, American States Insurance Company v. Williams 278 N.E.2d 295 (Ind. App., 1972), in which an insurer apparently had slept on its rights of recovery over but where the insurance policy specifically provided that the insurance company could have compelled its insured to join as a defendant the person actually responsible for injury to the insured, such joinder being permissible when the insured sued the insurer on the policy. The insurance company had failed to require such joinder and the Indiana court held that the insurer would have to take the consequences for such inaction.

The Great American hardly slept on any of its rights. The potentially culpable party here could not have been sooner sued by the Great American because that party could be sued only in the Federal court and the action against Great American could not be removed to that court. Only when the state court action was resolved and payment made, was the Great American in a position to seek indemnity from the culpable wrongdoer. The Great American policy did not have a provision by which the Great American could have required its insureds to bring suit against the culpable wrongdoer. Contrary to the statement of the court below, the Great American could not have placed such requirement in its insurance policy without an express act of the Legislature amending the statutory provisions of §168 of the Insurance Law.

It was urged by the Government below that the Federal Tort Claims Act must be strictly construed. The Supreme Court, however, has stated the contrary. In United States v. Yellow Cab Co. 340 U.S. 543 (1951), the Supreme Court held that the United States would be liable for indemnity as a third party when impleaded in an action. The court quoted an earlier decision stating:

"A sense of justice has brought on a progressive relaxation by legislative enactments of the rigor of the immunity rule. As representative governments attempt to ameliorate inequalities as necessities will permit, prerogatives of the government yield to the needs of the citizen... When authority is given, it is liberally construed."

In Aetna Casualty & Surety Company v. United States,

338 U.S. 366 (1949), the court stated:

"We think that the congressional attitude in passing the Tort Claims Act is more accurately reflected in Judge Cardozo's statement in Anderson v. Hayes Construction Co., 243 N.Y. 140, 147, 153 N.E. 28, 29-30: 'The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction, where consent has been announced.'"

The distinction between subrogation and indemnification urged by the Government and somehow discerned by the court below is illusory at best. There is a question as to whether the court below would have discerned such distinction if the plaintiff were not an insurance company. A reading of the opinion below certainly leads to an inference that if the plaintiff in this case were a steamship line or a railroad or some other entity who had paid pursuant to contractual or statutory obligation, the court below would have denied the Government's motion to dismiss. It is respectfully submitted that there is no convincing rationale offered as to why an insurance company which has paid pursuant to its contract should not enjoy the same rights as another business. There is nothing in any of the cases saying that the law of indemnification differs according to the nature of the business of the indemnitee.

The consequences of the decision by the court below would be to deprive an innocent party (here the Great American as indemnitee) of the right to have ultimate liability imposed on the actual party which caused the loss (the indemnitor which

in this case would be the United States). Such a consequence was not envisioned by Congress in passing the Federal Tort Claims act and it was not envisioned by Congress when it couched that Act's statute of limitations in the very specific terms of "after such claim accrues." The claim in this case accrued to the Great American when it made payment. It is respectfully submitted that the action is not time-barred.

CONCLUSION

The plaintiff made payment pursuant to contract to its insureds for damage allegedly caused by employees of the United States. When it made such payment, an implied contract of indemnity thereupon arose on the part of the alleged wrongdoer to assume ultimate responsibility for the alleged wrongdoing. At that time a claim accrued to the plaintiff which it seeks to assert in this action under the Federal Tort Claims Act. Accordingly, a true action in indemnification is stated, and the District Court's order and judgment of dismissal should be reversed and the complaint reinstated.

Respectfully submitted,

REIN, MOUND & COTTON
Attorneys for Plaintiff-
Appellant
BY: ARTHUR N. BROOK
A Member of the Firm

ADDENDUM

28 U.S.C. §2401(b)

"A tort claim against the United States shall be forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim by the agency to which it was presented. As amended July 18, 1966, Pub.L. 89-506, §7, 80 Stat. 307."

Service of three (3) copies of

the within

hereby admitted this 31st day

of January 1978

Rebecca Morris - for David
Attorney for /page